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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 24-170

ANDREW B. CRICHTON, R. M. CRICHTON, C. N. CRICHTON, M. E. CRICHTON, R. B. CRICHTON, AND A. B. CRICHTON, JR., COPARTNERS DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT COMPANY; THE MASON AND DIXON LINES, INC.; HOOVER MOTOR EXPRESS COMPANY, INC.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

JURISDICTIONAL STATEMENT BY THE PLAINTIFFS-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed October 24, 1944)

The plaintiffs-appellants respectfully present the following statement setting forth the grounds upon which it is contended that the Supreme Court of the United States has

jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed:

1. Statutory provisions sustaining the jurisdiction are:

U. S. C. Title 28, Section 47a (Act of March 3, 1911, c. 231, Section 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 41(28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C. Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C. Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C. Title 28, Section 345(4) (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Section 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

2. The decree sought to be reviewed was entered on August 24, 1944, and the application of plaintiff for appeal was presented on October 23, 1944 together with an assignment of errors.

3. The nature of the case and of the rulings of the court which bring this case within the jurisdictional provisions relied on and a statement of the grounds upon which it is contended that the questions involved are substantial are as follows:

This is an appeal from a decree of the District Court of the United States for the Southern District of New York

entered August 24, 1944 denying the prayer of a complaint which was filed in said Court in the above-entitled proceeding by the above-named plaintiffs under Part II of the Interstate Commerce Act and particularly under Section 207 of the said Act (49 U. S. Code 307) and pursuant to the provisions of Section 41(28) and Sections 43 to 48, inclusive, of Title 28 of the United States Code as applied and extended by Section 305(9) of Title 49 of the said Code.

Said complaint prayed that said District Court set aside and annul an order of the Interstate Commerce Commission entered November 2, 1943 in proceedings entitled *Southeastern Motor Lines, Inc.*, Common Carrier Application, No. MC-76037 insofar as said order and its accompanying report found that public convenience and necessity required operation by Associated Transport, Inc., as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between Nashville and Knoxville, Tennessee, over regular routes. The complaint filed in the above-named District Court alleged, among other things, that the Commission's said order was erroneous in law, and that the applicant was not entitled to a certificate as prayed in its application upon the evidence presented to the commission, and that by reason of the said order of the Commission approving the said application the plaintiffs would suffer great and irreparable damage to their business.

The case came on for final hearing before a Court of three judges pursuant to the provisions of U. S. C. Title 28, Section 47 (Act of October 22, 1913, C. 32, 38 Stat. 220). A transcript of all the evidence received before the Interstate Commerce Commission, duly certified by the Secretary of the Commission, was received in evidence before the said Court. On August 24, 1944 the Court rendered its opinion holding that the prayer of the complaint should

be denied and made its findings of fact and conclusions of law, and entered the final decree sought to be reviewed.

The questions involved by this appeal are substantial in that the case involves the duties and powers of the Interstate Commerce Commission with respect to the issuance of certificates of public convenience and necessity to common carriers under Section 207 of the Interstate Commerce Act authorizing new service or extension of operations upon a showing of illegal service under the so-called "grandfather" clause of Section 206(a) of the Interstate Commerce Act. They also involve the duties and powers of the Interstate Commerce Commission in authorizing the issuance of certificates of public convenience and necessity to common carriers by motor vehicle authorizing competitive operations with existing common carriers by motor vehicle without a finding that the service of existing carriers is inadequate to satisfactorily perform the proposed service.

The questions presented by this appeal further involve the power of the Interstate Commerce Commission to assign an application involving an operation proposed to be conducted in not more than three states to an Examiner for appropriate proceedings rather than to a Joint Board as specified in Section 205(a) of the Interstate Commerce Act.

4. The cases sustaining the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

Ziffrin, Inc. v. *United States,* 318 U. S. 73; 63 S. Ct. 465; 87 L. Ed. 621.

Howard Hall Co. v. *United States,* 315 U. S. 495; 62 S. Ct. 732; 86 L. Ed. 986.

United States v. *Carolina Freight Carriers Corp.,* 315 U. S. 475; 62 S. Ct. 722; 86 L. Ed. 971.

Loving v. *United States,* 310 U. S. 609; 60 S. Ct. 898; 84 L. Ed. 1387.

United States v. *Maher*, 307 U. S. 148; 59 S. Ct. 768; 83 L. Ed. 1162.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454; 55 S. Ct. 268; 79 L. Ed. 587.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74; 51 S. Ct. 1; 75 L. Ed. 221.

Ann Arbor Railroad Co. v. *United States*, 281 U. S. 658; 50 S. Ct. 444; 74 L. Ed. 1098.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1; 35 S. Ct. 602; 59 L. Ed. 1502.

5. The plaintiffs append hereto as Exhibit A a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Dated October 23, 1944.

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EXHIBIT A

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 24-170

ANDREW B. CRICHTON, ET AL., *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, ET AL., *Defendants*

Opinion

Filed Aug. 25, 1944

Before CLARK, *Circuit Judge,* and COXE and CONGER, *District Judges.*

Action by Andrew B. Crichton, R. M. Crichton, C. N. Crichton, M. E. Crichton, R. B. Crichton, and A. B. Crichton, Jr., copartners doing business as Super Service Motor Freight Company, The Mason and Dixon Lines, Inc., and Hoover Motor Express Company, Inc., against the United States of America and the Interstate Commerce Commission to set aside a commission order granting a certificate of public convenience and necessity as a motor carrier of property to Associated Transport, Inc., wherein the latter company and Southeastern Motor Lines, Inc., have intervened as defendants. Judgment for the defendants, dismissing the action.

Edgar Turlington, of Washington, D. C. (Neilson Olcott and Olcott, Havens, Wandless & Stitt, all of New York City, and James E. Wilson and Roberts & McInnis, all of Washington, D. C., on the brief), for plaintiffs.

Edward Dumbauld, Sp. Asst. to Atty. Gen., of Washington, D. C., (James B. M. McNally, U. S. Atty., and William L. Lynch, Asst. U. S. Atty., both of New York City, and Wendell Berge, Asst. Atty. Gen., and Robert L. Pierce, Sp. Asst. to Atty. Gen., both of Washington, D. C., on the brief), for defendant United States.

Edward M. Reidy, Asst. Chief Counsel, Interstate Commerce Commission, of Washington, D. C., (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Washington, D. C., on the brief), for defendant Interstate Commerce Commission.

Mortimer Allen Sullivan, of Buffalo, N. Y., for Intervening Defendants Associated Transport, Inc., and Southeastern Motor Lines, Inc.

CLARK, *Circuit Judge:*

Plaintiffs, as competitors of Associated Transport, Inc., a motor truck line, bring this action under 28 U. S. C. A., secs. 41(28), 43-48, and 49 U. S. C. A. sec. 305(g), to set aside an order of the Interstate Commerce Commission, dated November 2, 1943, which granted Associated the certificate of public convenience and necessity required by Part II of the Interstate Commerce Act, formerly the Motor Carrier Act, 1935, secs. 206(a), 207(a), 49 U. S. C. A. secs. 306(a), 307(a), to enable it to act as a common carrier of property by motor vehicle in interstate commerce over regular routes between Nashville and Knoxville, Tennessee. Associated is the eventual successor in interest to three brothers Jacobs, copartners doing business as Jacobs Motor Service, who in January, 1935, applied to the Railroad and Public Utilities Commission of Tennessee for a permit to operate as a common carrier by motor vehicle in interstate commerce between Nashville and the Tennessee-Virginia state line at Bristol, Tennessee. Although the Tennessee Commission denied this application on March 27, 1935, the Jacobs nevertheless commenced trucking operations between Nashville and New York City in April of the same year. In June, 1935, one of the brothers was arrested for lack of a Tennessee permit; but the state commission reconsidered its previous decision by granting the requested permit in July, 1935, and service to New York hence continued. On February 11, 1936, the Jacobs made application to the Interstate Commerce Commission under the "grandfather" clause of section 206(a) of the then new Motor Carrier Act, 1935,

for a certificate of public convenience and necessity as a common carrier by motor vehicle between Nashville and New York City. They made no trips after February 17, 1936, however, and the following month sold all their operating rights to Hoover Lines, Inc.

Although Hoover requested and received from the Tennessee Commission in March, 1936, approval of its purchase of the Jacobs' state operating rights, it delayed in making application to the I. C. C., for approval of the purchase, as required by section 213 of the Act, until June, 1936. Meanwhile no operations took place over the line. On June 11, 1937, the I. C. C., approved the purchase, but noted in its report that Hoover had upon oral argument abandoned any claim to the Jacobs' "grandfather" rights between Knoxville and New York because of other pending applications covering that much of the route. *Hoover Lines, Inc.—Purchase—Jacobs,* 5 M. C. C. 97. Shortly thereafter, Hoover recommenced operations. On December 2, 1937, the I. C. C., in consideration of Hoover's previous abandonment of any claims from Knoxville to New York, restricted the original Jacobs "grandfather" application to operations between Nashville and Knoxville, and, pursuant to the mandate of section 205(a) of the Act regarding applications which involve operations in "not more than three States," referred the thus delimited application for hearing before a joint board.

Early in 1938, Hoover became bankrupt and sold its operating rights to Southeastern Motor Lines, Inc., which appeared at the hearing on the "grandfather" application before Joint Board 107 in Nashville in May, 1938. On June 29, 1938, the Joint Board recommended denial of the application. Then on July 16, 1938, Southeastern applied [1] to the I. C. C., for a certificate of public convenience and necessity as a common carrier between Nashville and New York under section 207(a) of the Act. Two months later, the Commission set aside its order of December 2, 1937, which restricted the original "grandfather" application to operations between Nashville and Knoxville, and

[1] Making, in form, two applications with two docket numbers, Cf. 43 M. C. C. 37, which are treated herein as a unit.

set down for hearing before an examiner in Nashville the two applications, under the "grandfather" clause and under section 207(a), for operating rights between Nashville and New York. At this hearing Southeastern, in addition to portraying the background set forth above, showed that it was the owner of some forty vehicles, and that it operated an extensive daily service of from one to three tractor-trailer units between Nashville and New York. Southeastern's shipping lists bore witness to the volume and scope of this service, while numerous satisfied shippers testified to its efficiency and expressed the opinion that there was a definite need that it be continued. Other carriers introduced similar evidence as to their respective services, and it appeared that there were a number of substantial motor carriers offering trucking accom-odations between Nashville and New York very similar to Southeastern's.

After considering the evidence for almost a year, the trial examiner denied both of Southeastern's applications by report and order of March 12, 1940. While review of this decision was pending before Division V of the I. C. C. early in 1942, the full Commission approved the acquisition by Associated of control over Southeastern and other carriers, *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137, a statutory district court refused to interfere, *McLean Trucking Co.* v. *United States*, D. C. S. D. N. Y., 48 F. Supp. 933, and the Supreme Court affirmed in a lengthy opinion, 321 U. S. 67, 71, which pointed out, inter alia, that as a result of the merger Associated "will be the largest single motor carrier in the United States." Hence Associated was substituted for Southeastern as applicant. Division V affirmed the holding of the examiner on December 30, 1942, one commissioner dissenting. 41 M. C. C. 671. Upon application for reconsideration, the full Commission on November 2, 1943, with four commissioners dissenting, reversed this determination in part and granted the section 207(a) application in so far as it related to operations between Nashville and Knoxville. 43 M. C. C. 37. The denial of the "grandfather" application remained undisturbed, since the Commission

deemed the cessation of operations by the Jacobs and Hoover between February, 1936, and July, 1937, not to have been an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of the statute; while the section 207(a) application was granted only as to operations between Nashville and Knoxville because Southeastern had already received permission in a separate proceeding for operations between Knoxville and New York. It is against this order that the plaintiffs bring the present action. Associated and Southeastern have joined as intervening defendants with the permission of the court.

Section 206(a) of the present Part II of the Interstate Commerce Act provides that "no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." Then follows the so-called "grandfather" clause or proviso which requires the Commission to issue a certificate upon no further showing than that the applicant was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control," provided application was made to the Commission for a certificate within 120 days after October 1, 1935.

Section 207(a) orders the issuance of a certificate of public convenience and necessity "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and

necessity." Section 205 meanwhile prescribes the administrative procedure to be followed by the Commission. By the terms of section 205(a), "The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *." Section 205(b) prescribes that joint boards shall generally be composed of one member from each state involved.

Plaintiffs urge at the outset that the order of the Commission is void, since the section 207(a) application involved operations in "not more than three States," and hence that reference for hearing before a joint board, rather than an examiner, was mandatory under section 205(a). But the original application of July 16, 1938, covered operations between Nashville and New York, well in excess of three states; and in the absence of direct evidence of fraud or deception, the Commission should not be obliged to go beyond the face of the application in determining whether or not reference to a joint board is mandatory. Any other rule would be the source of endless confusion and needless circuity of action. See *West Coast Bus Lines, Ltd., Common Carrier Application*, 32 M. C. C. 619, 621-622, approved as to this issue by the full Commission, 41 M. C. C. 269, 270, and thereafter by a statutory court in *North Coast Transportation Co.* v. *United States*, D. C. N. D. Cal., 54 F. Supp. 448, 450-451.

Turning to the merits, objection is futile that the Commission erred in taking past operations into consideration in determining the present or future public convenience and necessity of the applicant's operations. The Commission has held, in persuasive opinion, that, where past operations have been conducted under color of "grandfather" rights, openly and without subterfuge, as was surely the

case here, they are competent evidence on the issue of public convenience and necessity. *D. A. Beard Truck Lines Co., Common Carrier Application—New Operation,* 34 M. C. C. 395; *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points,* 42 M. C. C. 315, 332; *Fisher Common Carrier Application—New Operation,* 42 M. C. C. 695, 696, 697; *Trans-American Van Service, Inc., Common Carrier Application;* No. MC-22254, decided January 22, 1944, 43 M. C. C. ——. And since the issue under this section is not as to "grandfather rights," but as to public demand or need, or how much the applicant's service is required and used by the public, it is not a bar to admissibility of such evidence that the past operations may have been conducted in violation of state law, as the operations from April to June, 1935, by the brothers Jacobs very likely were. *Ibid.* Certainly with this evidence the Commission's finding of public convenience and necessity was amply justified by the evidence; and the Commission, of course, with its expert judgment in this field, is the trier of facts. *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158; *Merchants' Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Alton R. Co.* v. *United States,* 315 U. S. 15, 23; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 482. As the Commission stated in *Dougherty Storage & Van Co. Common Carrier Application,* 3 M. C. C. 427, 432, "Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation." See also *Black & White Express Contract Carrier Application,* 6 M. C. C. 633, 634.

Although the Commission found that Associated was "fit, willing, and able properly to perform the service proposed," as required by section 207(a), there was no evidence regarding the matter in the record. Instead, the Commission supported its finding by reference to the recent thorough investigation of Associated which it had conducted during the 1942 control and consolidation proceeding. *Associated Transport, Inc.—Control and Consolidation, supra.* This was the identical procedure followed by the Commission in its earlier decision in *Hoover Motor Express Co., Inc. Extension of Operations—Intermediate Points, supra,* 42 M. C. C., at page 317. Plaintiffs here were parties to the

consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp.* v. *West Virginia Pulp & Paper Co.*, 2 Cir., 141 F. 2d 1; *Goldstein* v. *Groesbeck*, 2 Cir., 142 F. 2d 422, citing *National Fire Ins. Co. of Hartford* v. *Thompson*, 281 U. S. 331, which collects the Supreme Court cases; and the Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case.

The case was submitted on a full record of all proceedings before the Commission and upon the stipulation of all parties that final judgment should be rendered. It follows from what we have said that the action must be dismissed on the merits with costs. Defendants have asked us to sign purely formal findings of fact. Since it is the Commission's duty, not ours, to find the facts, this seems at least superfluous, *Public Service Commission of State of New York* v. *United States*, D. C. S. D. N. Y., July 17, 1944. — F. Supp. ——; but to avoid all doubt, we state that we accept and adopt the Commission's findings of facts, approve its conclusions of law, and decide that its order was made as to matters within its jurisdiction and authority and with the support of substantial evidence, and that it is valid and lawful. A final decree to that effect is being filed with this opinion.

CHARLES E. CLARK,
U. S. Circuit Judge.
ALFRED A. COXE,
U. S. District Judge.
EDWARD A. CONGER,
U. S. District Judge.

FILED
DEC 16 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 732

ANDREW B. CRICHTON, R. M. CRICHTON, C. N. CRICHTON, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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NDREW B. CRICHTON, R. M. CRICHTON, C. N. CRICHTON, ET AL.,

Appellants,

vs.

HE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

PPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

RIEF IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM

The appellants oppose the motion to affirm the decree of e District Court.

Preliminary Statement

Shortly before his death the Honorable Joseph B. Eastan, speaking before the Association of Interstate Commerce Commission Practitioners, summarized his wide ex-

perience in the field of administration of laws governing common carriers. He then said in part:

> "The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it."

It is the contention of the appellants that in this instance the Statutory District Court committed this error. We fear that the disposition of this cause on motion to affirm will deprive this Court of the advantage of mature presentation of a particularly acute instance of arbitrary and capricious conduct on the part of the Interstate Commerce Commission. The final order of the entire Commission issued herein reversed the informed action of its Division specially charged with the initial appellate consideration of the question and reversed the action of its own Examiner in the same matter. In the process it reversed a Joint Board which on June 2, 1938, *more than five years previously,* had recommended denial of operating rights to the predecessor in interest of Southeastern Motor Lines, Inc., which in the same year initially filed the present application.

There was no additional evidence of any kind which would warrant reversal by the Commission of its Division, except the substitution by its Division of Associated Transport, Inc., while action was pending on motion for reconsideration for the original applicant. We believe we can convince the Court, if permitted to do so, that the Commission became confused in the turmoil of matters of an entirely different character originated by Associated, and that its action in the present cause ignores the record and errs materially as a matter of law, as well as of fact, because of

this confusion. It is the position of the appellants that the District Court in furtherance of an acknowledged and developing judicial tendency to avoid interference with established administrative agencies failed in this instance to recognize the exceptional case where important matters of statutory obligation and legal precedent had been considered incorrectly by the Commission or had not been considered at all.

The certificate which the appellants consider invalid is in force. Associated is operating. The only reason that the appellants have incurred the heavy expense of prosecuting this appeal is a desire to present to this Court in full three substantial errors of law dependent for determination upon a full analysis of a complicated record involving contradictory evidence which cannot be considered adequately on motion.

The Jurisdictional Error

When on June 2, 1938, a Joint Board, appointed by the Interstate Commerce Commission, after hearing, recommended denial of operating rights under the "grandfather" clause, Section 206 (a) of the Interstate Commerce Act, counsel for a predecessor of Associated Transport, Inc., immediately filed two applications under Section 207(a) purporting to seek the same rights to operate from Nashville, Tennessee to New York City as were claimed under "grandfather" rights on behalf of the original applicant. Nevertheless, the applicant prosecuted appeals from the recommendation of the Joint Board on the "grandfather" matter until its final denial on December 30, 1942, by Division 5 of the Interstate Commerce Commission. The entire Commission, on November 2, 1943, permitted the adverse decision in the "grandfather" case to stand. At the latter date, the entire Commission reversed Division 5 (four Commissioners dissenting) as to the convenience and

necessity case but granted authority to operate only between Nashville and Knoxville because Southeastern, which had been the applicant until the substitution of Associated, already possessed operating rights between Knoxville and New York. As shown at page four of the appellee's motion to dismiss, the Commission was well aware of the fact that Southeastern possessed such rights because on December 2, 1937, in a finance order authorizing the acquisition by a predecessor of Southeastern of the original claimed "grandfather" rights herein, the Commission had restricted the purchase to the route between Nashville and Knoxville for this reason. Since the present application was not filed until July, 1938, the then applicant was fully aware that it possessed operating rights from Knoxville to New York and that the Commission could not and would not issue duplicating rights to the same party over this portion of the route. It follows that its request in July, 1938, for a new route from Nashville to New York was not made in good faith and was in that form solely to avoid assignment of the cause as required by Section 205(a) to a joint board representing the single State of Tennessee in which the entire route, which it wanted and could receive, was located.

It is true that a comprehensive examination of the record is required to verify the asserted facts disclosing the fraudulent nature of the multi-state application. In their motion, the appellees conceded that the Commission referred the "new service" applications under Section 207(a) to an examiner rather than to a properly appointed joint board as required by Section 205(a). They further conceded that immediately upon the convening of the hearing the present appellees disputed the jurisdiction of the Examiner and the record will disclose that the Examiner insisted on continuing with the hearing, notwithstanding his own doubts as to his jurisdiction to proceed. It is to be

noted that the "grandfather" application, as originally filed, involved more than three states and it had been reopened for rehearing. Furthermore, when the "grandfather" application was reassigned for further hearing, the Commission, as is its practice, had vacated a compliance order issued December 2, 1937, restricting the original "grandfather" rights to operations between Nashville and Knoxville. This had been entered as a result of the attempted abandonment by Hoover, another predecessor of the Knoxville to New York operation (See jurisdictional statement page 8). However, the reason for the vacation of the compliance order certifying "grandfather" rights between Nashville and Knoxville was the contention of the present appellees, as protestants, that by abandoning the through Nashville-New York service and using Nashville-Knoxville as an extention to other operations the then applicant had abandoned any possible "grandfather" rights, a contention ultimately supported by the Commission.

The facts in this case, when prior orders and the entire record are considered, differ substantially from *North Coast Transportation Company* v. *United States,* D. C. N. D., Cal., in that the cited case involved a *bona fide* application calling for one type of joint board with subsequent modification at the hearing to a route required to be submitted to another type of joint board whereas in the present case the application of July 16, 1938, was filed only because of the applicant's loss of alleged "grandfather" rights which were maintained under appeal for more than four years additional and only as an evasion of the specific statutory requirement of Section 205(a). That section provides that "the Commission shall, • • • " not that the Commission may refer such an application as an extension between Knoxville and Nashville within Tennessee to a joint board composed solely of one member from that state. There is

no ambiguity and if there were reference to the Legislative History, 79th Congressional Record, 74th Congress, page 5653, will show that the Chairman of the Senate Committee, in discussing the provision before the Senate, emphasized the intension of Congress *and of the Interstate Commerce Commission* to submit such matters to "board composed of the representatives of the states wholly or chiefly concerned." It is respectfully submitted that the mere fact that ultimate determination in the event of submission to either an examiner or a joint board rests with the entire Commission is not sufficient reason for disregarding this jurisdictional Congressional mandate as to the original hearing. The appellants have never waived this jurisdictional question. The fact that this Court will ultimately consider a question arising on special appeal through a Statutory District Court or on certiorari through the Circuit Courts does not induce it to disregard original jurisdiction. The entire matter should be remanded for reconsideration and rehearing, particularly in view of the obviously inadequate consideration on the merits and disregard of due process.

Illegal Operations As Evidence

The report of the Commission on reconsideration decided November 2, 1943, from which appeal to the District Court was had, embraced decision denying the "grandfather" application and also reversing its prior report in 41 MCC 671, and granting Associated Transport, Inc., the right to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between Nashville and Knoxville, Tennessee, over regular routes.

It should be borne in mind that reconsideration of the action of Division 5 as to the new service application was granted because "with respect to its extension applications,

applicant contends that the Division erred in not considering evidence of past operations" (Sheet 2). In its final consideration of the entire record the Commission did consider the evidence of past unlawful operations as proof of future requirement of the applicant's service. The District Court states "The Commission had held, in persuasive opinion, that, where past operations have been conducted under color of 'grandfather' rights openly and without subterfuge, *as was surely the case here,* they are competent evidence on the issue of public convenience and necessity." (Emphasis supplied.) Careful examination of the record will disclose (1) that the services reinaugurated by Southeastern, the applicant, predecessor of Associated, after abandonment of the "grandfather" services included service to both Nashville and Knoxville, and interchange with other motor carriers at those points; (2) that it included the carriage of general commodities between Nashville and New York and certain other eastern points; (3) that the "wide variety of commodities, transported since July 1937" (Sheet 4, Commission Report) were entirely dissimilar to the single commodity, enameled table tops and similar products, transported only from Nashville to Brooklyn, New York, in the initial "grandfather" period, and the "fish and oysters" from Norfolk, Virginia, to Nashville (Iden. Sheet 2) constituted the only transportation claimed under the "grandfather" case.

When it filed its new service application on July 16, 1938, seventeen days after the recommended denial of its "grandfather" application, the predecessor of the applicant well knew that the only "grandfather" rights it could prove were for through transportation from Nashville to New York without return cargo, and that the exclusive commodity was enameled table tops and pertinent freight. It follows that the expanded service established after 1938 by reason of the subsequent affiliation with large system

carriers of Associated Transport, Inc., was not conducted under color of "grandfather" rights. In fact, the record shows that the applicants repeatedly protested as illegal the scope of the operations of Southeastern as being initiated without color of "grandfather" rights and upon filing years after "grandfather" date of general service tariffs, but the Commission, too busy to enforce compliance, relied upon the ultimate solution of the problem in the "grandfather" decision, and permitted the obviously illegal transportation to continue, exactly as in an earlier finance or acquisition case involving these rights it had deferred consideration of the splitting of a claimed "grandfather" right with destinations Nashville and New York only so as to permit the sale for $250 of operating rights between Nashville and Knoxville, although such rights had never been claimed by the "grandfather" applicant, Jacobs, and such operation was denied as illegal by the Tennessee Railroad and Public Utilities Commission. (See Hoover Lines, Inc.,—Purchase—Blair Jacobs, MC-F-55, 5 MCC 97, 98.) In that case, also the Commission required Hoover Lines, Associated's predecessor, to purchase only such "grandfather" rights as existed between Nashville and Knoxville. (Page 100.) In the present case it denied that any such "grandfather" rights had ever existed. It follows that all of the service rendered prior to the issuance of the certificate to Associated in the present case covering only new service was illegal, and none of it even purported to be within the known limitation of movement of table tops through from Nashville to New York by the original claimants of "grandfather" rights.

That being the case, the only evidence before the Commission of requirement of public convenience and necessity on the new service application involved herein was evidence of operations which were not only illegal as conducted in

violation of state law, but were also illegal under the Interstate Commerce Act by finding of the Commission itself. There was *no* other evidence of the requirement for the service and the District Court considered only the evidence of the illegal operations.

Verification of this allegation of the appellants requires mature consideration of the entire record, and cannot be determined upon the limited jurisdictional statement or even upon the averments of the motion to affirm. Section 206 (a) does provide that "pending the determination of such application, the continuance of such operation shall be lawful," but this is applicable only to the continuance of the service in which the predecessor "grandfather" applicant purported to be engaged.

It certainly is not contended by the Commission or by the government that an applicant can run into entirely new territory, or that he can materially change the nature of the business conducted, or that he can operate with rebates or discriminatory or unlawful rates, or while engaged in unlawful common control, merely because some form of application for "grandfather" rights had been filed. Any carrier engaged in competition can acquire substantial business, even to the destruction of existing carriers, if it can engage in unlawful practices and it is absurd to suggest that by so doing the carrier or a successor by purchase has proved that its services are required for the public convenience and necessity. The appellants are prepared to analyze not only the contradictory Commission decisions relied upon by the District Court, but all others related to the consideration of past services, in considering convenience and necessity upon the submission of this cause for consideration by the Court.

The action of the Commission complained of by appellants was the grant of a certificate of public convenience and necessity under section 207 (a) of the act which sec-

tion applied exclusively to new service operations. In *D. A. Beard Truck Lines Company, Common Carrier Application—New Operation*, 34 M. C. C. 395, 397, 416, and *Fisher, Common Carrier Application—New Operation*, 42 M. C. C. 695, 696-697, cited by appellees, the Commission held that certain carriers which instituted service prior to June 1, 1935, but were unable to prove the good faith of their operations in view of their having defied State laws should not be regarded as new operators. The doctrine itself is dubious and in any event is not applicable to the present case where the service rendered was without color of "grandfather" rights in Interstate Commerce as well as illegal within the purview of the state commission.

III

In connection with action on motor carrier convenience and necessity applications under Section 207(a) of Part II of the Interstate Commerce Act, the Commission has a statutory obligation to find that "• • • the applicant is fit, willing, and able properly to perform *the service proposed* • • •" (Emphasis supplied). Associated Transport, Inc., did not become a party to the present proceedings until after the close of the hearings and record, the issuance of the Examiner's Report denying the application, and the approval of that report by Division 5 of the Interstate Commerce Commission. There was no evidence relating to Associated Transport, Inc., before the Commission when it decided in the order complained of herein "that Associated Transport, Inc., is fit, willing, and able properly to perform the described operations;" the Commission did not state that it was relying on its judicial knowledge of the fitness of Associated Transport, Inc., and we deny that it could have done so on the basis of evidence adduced in a wholly dissimilar proceeding which did not involve convenience and necessity. Ex-

amination of the record in this case will disclose that there is not a single reference to Associated Transport, Inc., or to the public interest which might be served by its competitive introduction to the transportation service between Nashville and Knoxville as an extension of the gigantic system which it had assembled over the protest of the Department of Justice and of numerous injured interveners.

The District Court and the Appellees rely upon the fact that the Commission had conducted during 1942 an investigation of Associated Transport, Inc., in connection with control and consolidation proceedings. *Jurisdictional Statement,* p. 12. There are cited in support thereof certain cases upholding the power of Courts to take judicial notice of their own records, p. 13, but an examination of the authorities cited reveal a dissimilar statement of facts in the instances cited. The parties were the same or in similar position and the same issues were involved. The purpose of appearance and the nature of proof were identical. In the present instance the issue is entirely dissimilar by reason of the statutory requirement that there must be proof of public convenience and necessity over the specific route and service involved and the fitness to render such service must be suited to the geographical and traffic requirements in the light of existing competition. In an acquisition case the Commission has repeatedly disclaimed that public convenience and necessity are essential. Financial capacity to acquire the property and the provisions of Section 5 of Part I of the Interstate Commerce Act are pertinent.

Could the Commission grant a certificate under Section 207(a) of Part II to an applicant over an extension of its own route without proof of convenience and necessity as to that extension because it had in another and dissimilar case involving a different route found that the applicant

was fit, willing, and able to perform the service as to the dissimilar route and that the public convenience and necessity required such service? The provisions of Section 207(a) are unambiguous and the public protection requires that the administrative body conform specifically thereto. The Court cites *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 93, as support for its statement that the Commission is an administrative body not limited by as strict rules of evidence as controls the Courts. However, in the same paragraph this Court went on to say "but the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted and defended. In such case the Commission cannot act upon their own information as could jurors in primitive days." The Court might have read further, but for the fact that the brief citing the authority used did not set forth completely the requirement as to evidence needed by this Court. In the *Louisville & Nashville R. Co.* case, this Court further said:

> "• • • but the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. • • • And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended on facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat."

The Appellants therefore assert that upon full presentation of the record, it will be disclosed that the Interstate Commerce Commission, with four of the Commis-

sioners dissenting, reversed its Division and its Trial Examiner, notwithstanding the asserted absence of jurisdiction; notwithstanding the absence of any evidence of the types which it usually requires for proof of convenience and necessity; and solely upon evidence of unlawful operations and, with respect to the present subject, in the complete absence of evidence or an opportunity for protestants to be heard as to the fitness, willingness, and ability of Associated Transport, Inc., properly to perform the described operations. If upon hearing the Appellants sustained the order of the District Court in confirming this action of the Commission and in specifically adopting these invalid findings, there will be no alternative but the vacation of the certificate improperly issued by the Commission.

Conclusion

Appellants are aware of the reluctance of the Supreme Court to consider issues within the statutory discretion of administrative tribunals. In this case, three important errors of law which affect the jurisdiction of the Commission, the possibility of a substantiated finding and the nonexistence of any evidence to support a finding specifically required by the statute as a precedent to issuance of a certificate, have been accorded the same presumption of correctness by the statutory court as has become the rule with respect to the weighing of evidence. The Appellants are of the opinion that disposition of this appeal on motion will encourage the continuation of arbitrary reversal of designated divisions of multi-membered administrative bodies upon conference impressions and with further disregard for evidence painstakingly presented.

It is therefore prayed that the motion to affirm be denied and that the appeal be considered by the Court with

adequate opportunity of presentation upon the full record, brief, and oral argument of the issues presented.

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December 15, 1944.

(5737)

In the District Court of the United States for the Southern District of New York

Civil No. 24–170

ANDREW B. CHICHTON, ET AL., DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT, ET AL., PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated August 24, 1944,[1] of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 2, 1943, under Section 207 (a) of Part II of

[1] The court on the same date rendered a written opinion, which also contained findings of fact and conclusions of law.

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the Interstate Commerce Act[2] (49 U. S. C. 307 (a)), granted the application of Associated Transport, Inc.[3] (hereinafter referred to as Associated) for a certificate of public convenience and necessity, permitting it to conduct operations as a common carrier by motor vehicle of general commodities over a prescribed route between Knoxville and Nashville, Tennessee. Appellants are competing motor carriers. An appeal to the Supreme Court was allowed October 23, 1944, and the appeal papers were served on appellees on October 25, 1944.

As appears from the decisions of the Commission and of the District Court, this case has had a rather complicated history. The Commission's final decision disposes of three applications: one filed February 11, 1936 by three brothers Jacobs, copartners doing business as Jacobs Motor Serv-

[2] The pertinent portion of this Section provides as follows:

"Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

[3] Associated, together with its predecessor, Southeastern Motor Lines, Inc., intervened as defendants in the District Court.

ice, under the "grandfather" clause[4] of Section 206 (a) of Part II of the Interstate Commerce Act; and two identical applications, filed July 16, 1938 under Section 207 (a) of the Act by Southeastern Motor Lines, Inc. All three applications, as filed, sought the right to transport general commodities between Nashville and New York City by way of Knoxville.

Concerning the "grandfather" clause application, it appears that the Jacobs commenced trucking operations between Nashville and New York in April of 1935, despite the fact that the Tennessee Railroad and Public Utilities Commission had previously denied their application for a permit to operate as a common carrier by motor vehicle in interstate commerce between Nashville and the Tennessee-Virginia State line at Bristol, Tennessee. In June 1935 one of the brothers was arrested for lack of a Tennessee permit; but the

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[4] 49 U. S. C. 306 (a). This Section prohibits common carriers by motor vehicle to operate interstate commerce without a certificate of public convenience and necessity by the Commission authorizing such operations. But the "grandfather" clause requires the issuance of such a certificate upon a showing that the applicant or its predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the routes for which application is made, and has so operated since that time "except * * * as to interruptions of service over which applicant or its predecessor in interest had no control." This Section further provides that, "Pending the determination of any such application the continuance of such operation shall be lawful."

State commission reconsidered its previous decision by granting the requested permit in July 1935, and service to New York hence continued. However, they made no trips after February 17, 1936, and in the following month sold all their operating rights to Hoover Lines, Inc. Although Hoover requested and received from the Tennessee Commission in March 1936 approval of its purchase of Jacobs' state operating rights, it delayed in making application to the Interstate Commerce Commission for the required [5] approval of the purchase until June, 1936. Meanwhile no operations took place over the line. On June 11, 1937 the Interstate Commerce Commission approved the purchase, but noted in its report [6] that Hoover had upon oral argument abandoned any claim to the Jacobs' "grandfather" rights between Knoxville and New York, because of another pending application [7] covering that much of the route. Shortly thereafter, in July, 1937, Hoover recommenced operations between Nashville and Knoxville. On December 2, 1937, the Commission, in consideration of Hoover's previous abandonment of any claims from Knoxville to New York, restricted the original Jacobs' "grandfather" application to operations between

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[5] By Section 213 of the Motor Carrier Act of 1935, now Section 5 of Part I of the Interstate Commerce Act (49 U. S. C. 5).

[6] *Hoover Lines, Inc.—Purchase—Jacobs*, 5 M. C. C. 97.

[7] Namely, Hoover's own "grandfather" application between those points. See 5 M. C. C. 97.

Nashville and Knoxville, and, pursuant to the mandate of Section 205 (a) (49 U. S. C. 305 (a))* of the Act regarding applications which involve operations in "not more than three States," referred the thus delimited application for hearing before a Joint Board. Such hearing was had in May 1938. In the meantime, however, Hoover had become bankrupt and sold its operating rights to Southeastern Motor Lines, the latter continuing the operations and appearing at the hearing in support of the application. On June 2, 1938, the Joint Board recommended denial of the "grandfather" application.

The two applications under Section 207 (a) seeking operating authority between Nashville and New York were then filed by Southeastern on July 16, 1938. By order of September 28, 1938 the Commission set aside its order of December

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* That Section, so far as pertinent, provides:

"The Commission shall, when operations of motor carriers * * * conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers * * * conducted or proposed to be conducted involve more than three States, refer to a Joint Board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *. The Joint Board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier * * * operations involved in such matter or are proposed to be conducted: * * *."

2, 1937, in which it had restricted the original "grandfather" clause application to operations between Nashville and Knoxville, and by order of November 8, 1938, describing the routes for which authority was sought between Nashville, Knoxville and New York, it set down for hearing before its own examiner the "grandfather" application. Subsequently, by order of March 1, 1939, the two Section 207 applications were set down for hearing before the same examiner at the same time and place.

The examiner, after a hearing from March 6–8, 1939, on March 12, 1940 issued a proposed report denying all three applications. While review of this decision was pending before Division 5, early in 1942 the full Commission approved the acquisition of control by Associated of Southeastern and other carriers.[9] Pursuant to this approval, Associated purchased, among other things, all the operating rights claimed herein and was substituted as applicant in the present case. On December 30, 1942 Division 5 issued a report and order[10] dismissing all three applications. Upon application for reconsideration, however, the full Commission issued its report and order,[11] here attacked, which reversed this determination in part and granted

[9] *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137. Such action was ultimately sustained by the Supreme Court in *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

[10] 41 M. C. C. 671.

[11] 43 M. C. C. 37.

the applications under Section 207 (a) insofar as they related to operations between Nashville and Knoxville. The denial of the "grandfather" application remained undisturbed, since the Commission deemed the cessation of operations by the Jacobs and Hoover between February 1936 and July 1937, not to have been an interruption of service "over which the applicant or its predecessor in interest had no control" within the meaning of Section 206 (a) (footnote 4, *supra*). The Section 207 (a) applications were not granted as to operations between Knoxville and New York because Southeastern had already received authority to conduct such operations in separate proceedings.[12]

[12] This was under the Hoover "grandfather" clause application mentioned in footnote 7, *supra*, No. M. C. 60451, to which rights also, Southeastern, and thereafter Associated succeeded. In that case a so-called "compliance order" was first issued on September 24, 1937 directing that upon compliance with certain provisions of the Act, and unless otherwise ordered by the Commission, a certificate authorizing operations between Knoxville and New York should be issued. Upon protest of a competitor the effective date of this order was stayed by order of October 23, 1937. Subsequently, on October 3, 1938, a new "compliance order" was issued vacating the earlier "compliance order" and directing the ultimate issuance of a certificate between Knoxville and New York. On November 29, 1938 the Commission of its own motion issued a new "compliance order" setting aside the order of October 3, 1938, but granting prospective rights identical with those in that order, except with respect to service to certain intermediate points. Subsequently competing motor carriers filed motions to vacate this order, which were denied by Division 5 on June 24, 1941, and finally by the full Commission on July 6, 1942.

The basis for the full Commission's ultimate finding that public convenience and necessity required operation by Associated between Knoxville and Nashville is set forth in the following excerpt from its opinion:

> It is clear that applicant and its predecessor, Hoover, have rendered a substantial service between Nashville and eastern points through Knoxville. This service has been used by many satisfied shippers who are strongly opposed to the termination of a proven service of such long standing. Such user is indicative of a public need for the continuance of the service. We have carefully considered the record and do not subscribe to the contentions of protestants that the existing service is adequate or that applicant's service to the extent hereinafter authorized is not required by the public convenience and necessity. In this connection, we cannot overlook the fact that applicant is not a new operator; that it has built up a substantial business in a manner highly satisfactory to its customers; and that such customers have expressed a desire and need for the continuance of the service. In view of the fact that applicant and its predecessors, under color of "grandfather" rights, have been in active competition with protestants for many years, we do not believe that the latter will be materially affected by the grant of authority here made.

> As noted, Associated pursuant to the findings in *Associated Transport, Inc.—Control and Consolidation, supra* [38 M. C. C. 137], purchased among other things, all of the operating rights claimed herein. There is no evidence in this record to establish that Associated is fit, willing, and able to conduct the proposed service. However, we have no hesitancy in concluding that it is fit, willing, and able to conduct any extended operations which may be authorized herein. With a view to avoiding a further hearing in these proceedings with the accompanying inconvenience to the parties, we shall grant the authority found warranted herein to Associated.

Appellants attack the Commission's decision on three principal grounds: (1) that the applications under Section 207 (a) involved operations in "not more than three states" (*i. e.,* only from Knoxville to Nashville in Tennessee), and hence that reference for hearing before a Joint Board rather than an examiner was mandatory under Section 205 (a); (2) that the Commission erred in concluding that public convenience and necessity required these operations on the basis of past and allegedly unlawful operations; and (3) that the Commission erred in finding that Associated was "fit, willing, and able properly to perform the proposed service," when there was no evidence on that question in the present record, on the basis of its findings with respect to Associated in its

recent decision permitting that company to gain control of other carriers. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) The applications under Section 207 (a) were properly referred for hearing by the Commission to its examiner rather than to a Joint Board. Section 205 (a) (see footnote 8, *supra*) requires the Commission to refer an application for certificate to a Joint Board rather than an examiner, only when the operations proposed to be conducted involve not more than three States. It has recently been settled that, in the absence of fraud, the need for a Joint Board must be ascertained from the conditions indicated in the application rather than in the evidence at the hearing. *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448, 450 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944. Here the Section 207 (a) applications on their face, as filed, involved operations between Nashville and New York City by way of Knoxville, through obviously more than three States, so that, so far as the applications were concerned, reference to an examiner rather than a Joint Board was permissible. Appellants urge, however, that by the time, March, 1939, when the case was referred to the examiner, and heard by him, Southeastern had already in other separate pro-

ceedings [13] been granted rights between Knoxville and New York, so that all that was left here were applications involving an operation between Nashville and Knoxville in one State. But even if there had been at that time any final granting in these other proceedings of rights between Knoxville and New York, that fact would not automatically, without some further action by applicant, have resulted in a delimiting amendment of the present application. In any event, these other proceedings could not at that time have resulted in automatic amendment of the Section 207 (a) applications, since such proceedings had not then been carried to the state of finality. As indicated in footnote 12, there was then only an outstanding compliance order, entered in those proceedings on November 29, 1938. A compliance order is not necessarily a final order, but remains under the control of the Commission (*Crescent Express Lines* v. *United States*, 320 U. S. 401, 404–405) and here the "compliance order" did not become final until July 6, 1942, when, as appears in that footnote, motions to vacate were dismissed by the full Commission. Appellants assert, too, that the Section 207 (a) applications, in requesting rights between Knoxville and New York, as well as between Nashville and Knoxville, were fraudulent. There is absolutely nothing in the record to support such a contention. When the Section 207 (a)

[13] Those in M. C. 60451 described in footnote 12, *supra*.

applications were filed on July 16, 1938, there was clearly no way for the applicant to tell that it might ultimately receive rights between Knoxville and New York in these other proceedings, since there was at that time not even an outstanding "compliance order" in such proceedings.[14] To increase the possibility that it would in some proceedings secure the desired right to operate between Knoxville and New York, it was therefore natural for it to include a request for operating rights between those points in its Section 207 (a) applications.

It is significant, too, that appellants did not raise this objection in their briefs before the Commission, nor did they file any petition for reconsideration by the full Commission of its action.[15] In fact, in its reply to Southeastern's exceptions to the examiner's proposed report, appellant Super Service Motor Freight specifically took the position that consideration by the examiner rather than by a Joint Board was perfectly proper.[16] Under similar circumstances an objec-

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[14] See footnote 12, *supra*.

[15] Rule 87 of the Commission's Rules of Practice expressly provides that: "An objection not pressed in brief will be considered as waived."

[16] In its reply of May 1, 1940, p. 14, which was in the record before the court, this appellant said:

"It was the applicant itself that filed an application covering more than three states and because of this fact it was incumbent upon the Commission to assign the said application for a hearing before an Examiner * * *."

tion made to the court that the case had not been referred by the Commission to the proper hearing agency has recently been dismissed as coming too late. *Carolina Scenic Coach Lines* v. *United States* (W. D. N. C.), 56 F. Supp. — (July 21, 1944);[17] see *Chicago, St. P., M. & O. Ry.* v. *United States*, 322 U. S. 1, 3–4.

(2) Objection is equally futile that the Commission erred in determining that the public convenience and necessity required these operations on the basis of evidence of substantial, long-standing and successful past operations. Public convenience and necessity have reference to the public need for operations to insure adequate service. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 33, 45. Certainly the fact that shippers have in the past made substantial use of a carrier's facilities logically indicates that there is public need for the continuance of such operations to insure adequate service, even though the carrier cannot perfect its claim under the "grandfather" clause. The Commission's reliance on such proof here was consistent with its practice in several other persuasively reasoned recent decisions holding that where past operations have been conducted under color of "grandfather" rights, openly and without subterfuge, as was surely the case here, they are competent evidence on the issue of public convenience and necessity. *D. A. Beard Truck Lines*

[17] Now on appeal to the Supreme Court, No. 637. Defendants have also filed a motion to affirm in that case.

Co., Common Carrier Application—New Operation, 34 M. C. C. 395, 397, 416; *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points,* 42 M. C. C. 315, 332; *Fisher Common Carrier Application—New Operation,* 42 M. C. C. 695, 696–697.

Appellants urge, however, that these past operations were unlawful under the Interstate Commerce Act. They contend that when Hoover on July 1, 1937 recommended the operations, which the Jacobs had ceased on February 17, 1936, it was obvious, in view of this long interruption of service, that the Jacobs' "grandfather" claim, under which these operations were purportedly conducted, and which Hoover had acquired, was invalid. But the fact that a "grandfather" application may ultimately prove invalid is immaterial so far as the validity of the operations conducted under a pending application is concerned, for Section 206 (a) specifically provides that "pending the determination of such application the continuance of such operation shall be lawful." Furthermore, the Commission's decision permitting the acquisition of the Jacobs' "grandfather" rights by Hoover (5 M. C. C. 97, 100) specifically found that Hoover was also to acquire the "right to operate between Nashville and Knoxville pending determination of the 'grandfather' application of said Jacobs Motor Service." In any event, the mere fact that past operations may have been in

violation of law has been held not necessarily to prevent them from supporting rights, even under the "grandfather" clause, where actual past "bona fide" operation is required. *Alton R. Co.* v. *United States,* 315 U. S. 15, 24.

Since there was thus a rational basis and substantial evidence to support the Commission's finding of public convenience and necessity, that finding, as the District Court appropriately held, was conclusive. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 42; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 143–146; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944; *Kansas City and Leavenworth Transportation Co.* v. *United States,* 51 F. Supp. 916, 921 (D. Del.).

(3) As to appellants' third contention, it is sufficient, in disposing of that, to quote the portion of the District Court's decision dealing with that question:

> Although the Commission found that Associated was "fit, willing, and able properly to perform the service proposed," as required by § 207 (a), there was no evi-

dence [18] regarding the matter in the record. Instead, the Commission supported its finding by reference to the recent thorough investigation of Associated which it had conducted during the 1942 control and consolidation proceeding. *Associated Transport, Inc.—Control and Consolidation, supra.*[19] This was the identical procedure followed by the Commission in its earlier decision in *Hoover Motor Express Co., Inc., Extension of Operations—Intermediate Points, supra,* 42 M. C. C. at page 317. Plaintiffs here were parties to the consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp.* v. *West Virginia Pulp & Paper Co.,* 2 Cir., 141 F. 2d 1; *Goldstein* v. *Groesbeck,* 2 Cir., 142 F. 2d 422, citing *National Fire Ins. Co. of Hartford* v. *Thompson,* 281 U. S. 331, which collects the Supreme Court cases; and the

[18] There was, however, evidence of fitness and ability on the part of Southeastern, including a financial statement (Tr. 97), proof of compliance with the Commission's requirements as to insurance and safety (Tr. 121-2), and testimony as to the adequacy of equipment (Tr. 308).

[19] In that report (38 M. C. C. 137, 173) the Commission found that Consolidated, pending determination of the "grandfather" applications of the carriers consolidated into it, might continue such operations, which would include the present operations. It further found that the issuance of certain stock was necessary or appropriate for and consistent with the proper performance by Consolidated of service to the public as a common carrier, and would not impair its ability to perform that service.

> Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case.[20]

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1944.

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[20] It is significant, too, that appellants do not actually challenge Associated's ability to perform this service. Such a challenge would apparently be futile, as Associated from a revenue standpoint is now the largest single motor carrier in the country. See *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 71.

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No. 732. CRICHTON ET AL., DOING BUSINESS AS SUPER SERVICE MOTOR FREIGHT CO., ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. January 29, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *North Coast Transportation Co.* v. *United States, ante,* p. 668; *Carolina Scenic Coach Lines* v. *United States, ante,* p. 678; (2) *Alton R. Co.* v. *United States,* 315 U. S. 15, 24; and (3) *United States* v. *Pan American Petroleum Corp.,* 304 U. S. 156, 158. *Messrs. William A. Roberts, Edgar Turlington, James E. Wilson,* and *Mrs. Irene Kennedy* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Mr. Mortimer Allen Sullivan* for Associated Transport, Inc. et al., appellees. Reported below: 56 F. Supp. 876.